Supreme Court, U. S.
FILED
NOV 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-767

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO AND CLC, LOCAL UNION No. 1805,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, AEROSPACE DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BERNARD W. RUBENSTEIN,
EDELMAN, LEVY AND
RUBENSTEIN, P.A.
Suite 2400 — 10 Light Street
Baltimore, Maryland 21202
Attorneys for Petitioner
301-752-6160

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
THE OPINION OF THE DISTRICT COURT	4
THE OPINION OF THE COURT OF APPEALS	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	10

APPENDIX:

Opinion of the District Court	1a
Judgment	10a
Opinion of the Court of Appeals	11a
Judgment	16a
Arbitration Award	16a

TABLE OF CITATIONS

Cases

Alan Wood Steel Co., 33 LA 772 (1962)	5, 6
Alliance Manufacturing Co., 61 LA 101 (1973)	7
Bethlehem Steel Corp., 48 LA 223 (1966)	6
Harlo Products Corp., 59 LA 613 (1972)	6
H. K. Porter Co. v. N.L.R.B., 379 U.S. 99 (1970)	8

	PAGE
International Paper Co., Container Div., 76-1 ARB 5444 (1976)	5, 6
I.U.E. v. Peerless Pressed Metal, 489 F.2d 769 (1st Cir. 1973)	9
Joint Board, ILBWU v. Senco., Inc., 289 F. Supp. 513 (Mass. 1968)	8
Koppers Co., Inc., 42 LA 1321 (1969)	6, 9
Lucky Stores, Inc., 54 LA 18 (1969)	6
Mogge v. District 8, IAM, 454 F.2d 510 (7th Cir. 1971)	9
Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966)	8
Phillip Carey Mfg. Co., 37 LA 134 (1961)	5, 6
Pittsburgh Steel Co., 42 LA 1002 (1964)	6
Safeway Stores v. Bakery Workers, Local 111, 390 F.2d 79 (5th Cir. 1968)	8, 9, 10
Scovill Mfg. Co., 31 LA 651 (1958)	6, 9
Sherwin-Williams Co., 18 LA 934 (1952)	6
South Carolina Industries, Inc., 65 LA 745 (1975)	6
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)	9
Transpacific Co., Ltd., 48 LA 57 (1966)	6
United Steelworkers of America v. Amax Aluminum Mill Products, 451 F.2d 740 (9th Cir. 1971)	9
United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960)	7
United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960)	7, 9, 10
United Steelworkers of America v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974)	8
United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960)	7, 9
Vandium Corp. of America, 38 LA 389 (1962)	6

Statute

	PAGE
29 U.S.C. §185(a)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO AND CLC, LOCAL UNION No. 1805,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, AEROSPACE DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 23, 1977.

OPINIONS BELOW

The opinion of the district court, which is unreported, is reproduced in the Appendix (infra., pp. 1-10a). The opinion of the Court of Appeals is not yet reported, but is also reproduced in the Appendix (infra., pp. 11-16a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1977 and is reproduced in the Appendix to this petition. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May a labor arbitrator be forbidden from making an award of damages in favor of a labor organization, where he properly finds a breach of the collective bargaining agreement by the employer, but where there is no evidence of monetary loss to the labor organization or its members?

STATUTE INVOLVED

29 U.S.C. § 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Westinghouse Electric Corporation, Aerospace Division, hereinafter referred to as "Westinghouse", is a manufacturer of various types of electronic systems, missile guidance systems, fire control systems, and radar systems used for both military and non-military purposes. On December 3, 1952, Westinghouse and Petitioner entered into a collective bargaining agreement, hereinafter called the "Agreement", and successfully renewed and extended the Agreement until July 12, 1976.

Article XIV, Section 1 of the Agreement provides in relevant part:

> "The vacation year will be a calendar year, and during the first quarter of the year, departmental heads shall consult with all employees entitled to vacations and establish the schedule for vacations . . . The Company will schedule vacation shutdowns for vacation purposes, and the time of year of the vacation shutdowns will be a matter for negotiations. The vacations will run concurrently with the vacation shutdown periods. It is recognized that some employees will be requested to work during the vacation shutdown periods . . .
>
> The Company shall be required to designate the time of the vacation shutdown or shutdowns before January 1 of the vacation year after such time has been made a matter for negotiations as above provided . . ."

This provision requires Westinghouse to engage in certain negotiations with Petitioner during the calendar year prior to its scheduling of any plant shutdown.

On November 25, 1974, Westinghouse notified Petitioner that it was considering a "Christmas week closedown" in 1975. As the Arbitrator found, Petitioner attempted to arrange a negotiating committee meeting between the parties to discuss the proposed shutdown, but the meeting did not occur until December 16, 1974, only two weeks prior to the deadline set by the Agreement by which time Westinghouse must have completed negotiating and designating the dates selected for the shutdown.

Petitioner approached the December 16, 1974 meeting with several questions concerning the proposed shutdown, the answers to which were preconditions to the occurrence of negotiations as contemplated by Article XIV, Section 1, of the Agreement.

These questions were raised by Petitioner at that meeting, but Westinghouse was unable to offer conclusive answers. Despite the lack of such information, Petitioner proposed the possibility of alternate dates for the shutdown. The meeting ended without resolution to these questions.

On December 20, 1974, without any further meetings having occurred between the parties, Westinghouse announced that it would proceed with its proposed shutdown of the factory during Christmas week, 1975. Petitioner, considering this action to be violative of the provisions of Article XIV, Section 1, of the Agreement, grieved the matter in accordance with the Agreement's grievance machinery and after unsuccessful attempts at a less formal settlement, submitted the issue to arbitration. The parties agreed to the selection of Seymour Strongin, Esquire as arbitrator of the dispute.

An arbitration hearing was held on September 24, 1975. The Arbitrator's decision of December 3, 1975 found that Westinghouse had violated Article XIV of the Agreement and awarded three days of either additional vacation days or wages to all employees, depending upon their specific situation (infra, pp. 19-20a).[1]

Westinghouse sued Petitioner to vacate the arbitration award. There being no dispute as to material facts, the parties each filed motions for summary judgment.

THE OPINION OF THE DISTRICT COURT

The district court granted the motion of Westinghouse and vacated the award. The court found the award to be improper on two grounds.

[1] Westinghouse had permitted some employees to take their vacations at the time of the individual's choice. Other employees were compelled to save three vacation days for the Christmas week shutdown. Since the first group was wrongly denied an earning opportunity, Strongin awarded them three days pay. The second group had a full earning opportunity, but were forced to endure a disruption to their vacation scheduling. Strongin awarded them three additional vacation days to compensate for this disruption.

First, the applicable language of the collective agreement refers to negotiations over the "time" of the shutdown. Since in its meeting with Westinghouse, Petitioner sought merely to question management about its plan, rather than to actually negotiate about the timing of the shutdown, the arbitrator "ignored the plain and unambiguous language of the contract" in finding that Westinghouse failed to negotiate as required by Article XIV of the Agreement (*infra*, p. 7a). Utilizing parallel reasoning, the district court concluded that Arbitrator Strongin exceeded the scope of the submission of the parties, by straying away from the subject of negotiations about the "time" of the shutdown (*infra*., p. 8a).

The second prong of the district court's rejection of the arbitrator's award concerned the remedy fashioned by Strongin. Relying upon prior labor arbitration cases involving other parties and distinct collective bargaining agreements,[2] the court held that the remedy was contrary to "industrial common law" which had become part of the Agreement (*infra*, p. 8a). Absent demonstrable economic loss, the award of additional vacation days was punitive, the district court concluded (*infra*, p. 10a).

THE OPINION OF THE COURT OF APPEALS

The circuit court rejected the district court's first line of reasoning, and found that Westinghouse had breached Article XIV, § 1 of the Agreement (*infra*, p. 13a). Nevertheless, the appellate court affirmed, holding

[2] *International Paper Co., Container Div.*, 76-1 ARB 5444 (1976); *Phillip Carey Mfg. Co.*, 37 LA 134 (1961); *Alan Wood Steel Co.*, 33 LA 772 (1960).

that the allowance of damages was improper absent evidence establishing a causal relationship between the contract breach and the claimed economic loss (*infra*, p. 15a).

Adopting the district court's reasoning, the appellate court found contrary arbitration precedent to be binding upon Strongin (*infra*, pp. 13-14a). Based upon this precedent, Strongin exceeded his authority, since only when a breach of the bargaining agreement causes a monetary loss to the employees effected by the breach may a labor arbitrator award compensatory damages (*infra*, p. 14a).

REASONS FOR GRANTING THE WRIT

1. Whether a labor arbitrator should fashion an economic remedy in the face of a contract breach, but absent evidence of economic loss is a recurrent question which this Court should decide.[3] The authority possessed by an arbitrator is a pervasive part of daily relations within the industrial community. Potential arbitration rulings concerning any grievance effect determinations of management and labor, just as potential court decisions effect the posture of civil litigants toward settlement. If the power of labor arbitrators is to be judicially limited in the manner of relief which he may order, as stated by the Court of Appeals, industrial combatants will have to alter their

[3] Even in the limited context of employer breaches of contractual provisions involving vacation rights, many published arbitration decisions have involved the issue of appropriate remedies. *International Paper Co., supra*; *South Carolina Industries, Inc.*, 65 LA 745 (1975); *Harlo Products Corp.*, 59 LA 613 (1972); *Lucky Stores, Inc.*, 54 LA 18 (1969); *Bethlehem Steel Corp.*, 48 LA 223 (1966); *Transpacific Co., Ltd.*, 48 LA 57 (1966); *Koppers Co., Inc.*, 42 LA 1321 (1964); *Pittsburgh Steel Co.*, 42 LA 1002 (1964); *Vanadium Corp. of America*, 38 LA 389 (1962); *Phillip Carey Mfg. Co., supra*; *Alan Wood Steel Co., supra*; *Scovill Mfg. Co.*, 312A 651 (1958); *Sherwin-Williams Co.*, 18 LA 934 (1952).

strategy of grievance handling, as well as presentation of arbitration cases.[4] Unions, employers and labor arbitrators themselves need to know the limitations which may properly be placed upon the authority of the latter.

2. In the seventeen years since rendering its decision in the Steelworkers Trilogy,[5] this Court has not considered the issue of arbitration remedies. During the interim, the Circuit Courts of Appeal have developed conflicting views concerning the breadth of judicially enforceable arbitration remedies (*infra*, p. 5a).

As recognized by the district court (*infra*, p. 5a), labor arbitrators enjoy wide latitude in fashioning remedies. As the Court pronounced in *Enterprise Wheel*:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

[4] For example, in discharge arbitrations, the parties do not normally dwell upon the specific amount of back pay to which a wrongfully terminated employee may be entitled. Rather, the arbitrator will merely determine the grievant's entitlement to such relief, *vel non*, and leave the precise dollar figure to settlement by the parties. If the parties remain unable to arrive at an acceptable settlement, the single issue of back pay may be subsequently submitted to arbitration in a distinct proceeding. See *Alliance Manufacturing Co.*, 61 LA 101 (1973). Petitioner submits that the instant decision of the Court of Appeals suggests that grieving parties must now prove up both damages and contract breach in order to receive economic restitution in all arbitration proceedings including discharge cases.

[5] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

363 U.S. at 597. The recognition of this need for flexibility has led to federal courts upholding unusual and drastic remedies tailored to particular fact patterns. Accordingly, the discretion allowed arbitrators by the courts is in excess of the type enjoyed by even the National Labor Relations Board.[6]

This great deference to be allowed arbitrators in fashioning an appropriate remedy was pronounced by the Fifth Circuit Court of Appeals in *Safeway Stores v. Bakery Workers, Local 111,* 390 F.2d 79 (1968). Petitioner submits that the policy considerations relied upon in that case are in conflict with those of the Court of Appeals in the instant matter. *Safeway* involved an employer-initiated policy whereby the weekly pay period was changed from Wednesdays to Fridays. The first paychecks under this system reimbursed employees for only two days efforts. Twenty-one employees filed grievances challenging this action on the ground that their collective bargaining agreement guaranteed them 40 hours pay for that payroll period. Although it was undisputed that the grievance sought pay for 24 hours which were not worked by any of the employees, the arbitrator awarded the payment. The decision was upheld through the trial and appellate levels.

Although the *Safeway* employer attacked the enforceability of the award, neither court found it to be punitive in nature despite the fact that the grievants suffered no actual long-run financial loss. Instead, the *Safeway* courts paid great deference to the arbitrator's

[6] For example, the Fifth Circuit Court of Appeals, in *United Steelworkers of America v. U.S. Gypsum Co.,* 492 F.2d 713 (5th Cir. 1974) upheld an arbitration remedy which projected wage increments above present rates as a remedy for an employer's failure to negotiate. The identical remedy was expressly denied the Labor Board by this Court in *H.K. Porter Co. v. N.L.R.B.,* 379 U.S. 99 (1970). Compare also *Joint Bd., ILGWU v. Senco. Inc.,* 289 F. Supp. 513 (Mass. 1968) with *Ozark Trailers, Inc.,* 161 NLRB 561 (1966).

authority. In fashioning an appropriate award, this *Safeway* rationale has been adopted by several Circuit Courts of Appeal.[7]

Comparison of the underlying arbitration awards in *Safeway* and the instant case show that the nature of Strongin's remedy has judicially enforced precedent. On the appellate level, these cases represent an irreconcilable split in the application of *Enterprise Wheel.* The *Safeway* employees suffered no real pecuniary loss but did experience a disruption to their personal financial planning. The arbitration award of three days pay to those employees was compensatory in that it cured the personal fiscal disruption which they suffered as a result of the employer's breach of the contract.[8]

[7] *United Steelworkers of America v. Amax Aluminum Mill Products, Inc.,* 451 F.2d 740, 743 n.3 (9th Cir. 1971), (arbitrator set burden of *disproving* presumed damages, absent evidence establishing them, upon *employer* which breached the contract, enforced by court). See generally, *IUE v. Peerless Pressed Metal Corp.,* 489 F.2d 769 (1st Cir. 1973); *Mogge v. District 8, IAM,* 454 F.2d 510 (7th Cir. 1971).

[8] The circuit court held that Strongin's award was contrary to "industrial common law", relying upon previous arbitration cases. *See footnote 1, supra.* Petitioner contends this view is incorrect on two grounds. First, the "industrial common law" concept as developed in *Steelworkers v. Warrior & Gulf Nav. Co., supra,* 363 U.S. at 580-82, is limited to a particular bargaining relationship, or at most a particular industry. The arbitration precedent utilized by the circuit court involve distinct industries, employers, unions and labor agreements. Second, even if the scope of "industrial common law" were to be expanded to include other bargaining relationships, Strongin's opinion does not stand alone in the area of compensatory damages for employees suffering wrongly disturbed vacation schedules. *Scovill Mfg. Co., supra,* relying upon *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931) for the proposition that once a breach of contract has been committed, the risk of uncertainty of the scope of determining damages rests with the party committing the breach. *Cf. United Steelworkers of America v. Amax Aluminum Mill Products, supra; Koppers Co., Inc., supra.*

The instant award fashioned by Strongin parallels the *Safeway* remedy. Westinghouse's employees suffered impairment to their personal vacation schedules which may have been avoidable if Westinghouse had engaged in negotiations as required by Article XIV, Section 1 of the Agreement. An award of three vacation days to these employees was a cure for the disruption of their personal planning in the same manner that the *Safeway* award of three days pay remedied the disruption to employee finances.

The second group of employees in the instant case were those who had already expended their vacation days. The three day shutdown of the factory by Westinghouse deprived them of income during a time when they had no paid vacation days due them. Since Westinghouse had failed to meet the prerequisites for a Christmas week shutdown, the three days of compensation would make these employees whole for the improper denial of their right to work for their employer. The remedy of three days pay for these employees would accomplish the same end as did the *Safeway* arbitration award.

CONCLUSION

Enterprise Wheel established a principal of broad latitude permitted labor arbitrators in fashioning appropriate remedies. The quantum of permissible latitude is an issue to which the circuit courts are in need of further guidance by this Court.

Respectfully submitted,

BERNARD W. RUBENSTEIN,
EDELMAN, LEVY AND
RUBENSTEIN, P.A.
Suite 2400 — 10 Light Street
Baltimore, Maryland 21202
Attorneys for Petitioner
301-752-6160

Dated: November, 1977

APPENDIX

MEMORANDUM AND ORDER

In The
United States District Court
For The District of Maryland

Westinghouse Electric Corporation, Aerospace Division

v.

International Brotherhood of Electrical Workers, AFL-CIO & CLC, Local Union No. 1805

Civil No. Y-75-1876

Action and Present Posture of the Case

This action was brought by Westinghouse against Local 1805 of the International Brotherhood of Electrical Workers, AFL-CIO & CLC (hereinafter called the Union or IBEW), seeking to vacate an arbitration award. Jurisdiction is based on 29 U.S.C. § 185.

The case is now before the Court on cross-motions for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, and the material facts are not in dispute. Judgment can be entered as a matter of law. 6 *Moore's Federal Practice,* ¶ 56.15 [1.-0].

Facts

IBEW is one of several unions representing workers at the Westinghouse Electric Corporation, Aerospace Division, which is located at the Defense Space Center adjacent to B.W.I. Airport. Westinghouse and the Union are parties to a collective bargaining agreement which

was in force at all times relevant to this case. A copy of the agreement is appended to the Complaint.

This dispute arose out of a vacation shutdown which the Company planned for December, 1975. Article XIV of the agreement provides:

> Sec. 1. . . . The Company will schedule vacation shutdowns for vacation purposes, and the time of year of the vacation shutdowns will be a matter for negotiations. The vacations will run concurrently with the vacation shutdown periods. . . .
>
> The Company shall be required to designate the time of the vacation shutdown or shutdowns before January 1 of the vacation year after such time has been made a matter for negotiations as above provided.

On or about November 25, 1974, Westinghouse formally informed the Union that it was planning a vacation shutdown for Christmas week of 1975. The Company selected Christmas week because there were already two paid holidays during that week, prior experience showed that a significant part of the work force would be absent from work anyway, making efficient operations all but impossible, and the Baltimore Gas & Electric Company had notified Westinghouse that the Company would probably not receive its full requirements of natural gas during the winter of 1975. At no time has the Union questioned the Company's good-faith motives or sound business reasons for choosing that particular week.

After some delay — for which neither party seems to be at fault — a negotiating session was held on December 16, 1974, at which the Union raised several questions concerning the proposed shutdown, apparently having to do with everything *but* the proposed time of the shutdown. The Union's questions had been raised by its members at a membership meeting on December 8, and the Union representatives felt that they had to report back to the membership and take a vote. Since the next regular membership meeting was

not scheduled until January 12, 1975, the Union asked the Company to withhold its final decision until after that date.

But the Company was faced with the contract terms which required that the time of the shutdown be designated before January 1, and with the fact that other unions at the plant had agreed to the Christmas week shutdown prior to the deadline. A delay would have been contrary to the terms of the collective bargaining agreement and might have jeopardized the agreement reached with other unions. On December 20, 1974, Westinghouse advised the Union that the vacation shutdown would take place during Christmas week of 1975. A grievance was filed by the Union on January 9, and the dispute remained unsettled through the established grievance procedures following which the Union requested that the matter be submitted to arbitration.

From the beginning, the parties were unable to agree on the wording of the issue to be submitted to the arbitrator. However, the issue as framed by the moving party, the Union, was whether the Company violated the agreement by "failing to negotiate with the local union the time of their announced 1975 plant vacation shutdown." The arbitration hearing took place on September 24, 1975, and the arbitrator issued his decision on December 3, 1975. In essence, the arbitrator found that the Company had violated the collective bargaining agreement by failing to provide sufficient time for negotiations in advance of the January 1 deadline.

The arbitrator then awarded to each employee three additional paid vacation days. Some employees had already taken their full vacations; they were to be paid for the three days during Christmas week. Others had reserved three days of vacation for the shutdown; they were to be given three additional days of vacation in 1976. The arbitrator took pains to say that this represented a "non-punitive remedy for the violation found."

Unhappy with the arbitrator's award, the Company filed this action asking the Court to set the award aside on the following grounds:

1. The arbitrator ignored the clear language of the agreement which says that the *time* of the vacation shutdown will be a matter of negotiations. The Company claims that the arbitrator read the agreement to say that all aspects of the shutdown had to be negotiated, including, for example, whether or not to shut down at all.

2. The arbitrator's decision went beyond the issue submitted to him.

3. The arbitrator's finding is contrary to the evidence.

4. The arbitrator awarded punitive damages beyond his authority under the agreement and contrary to settled arbitration law.

5. The arbitrator improperly expanded the agreement by, in effect, adding three days of paid vacation to the agreed schedule of paid vacation time.

The Union, in its Motion for Summary Judgment, takes a very simple and straightforward position based on the great deference which is shown by the courts to labor arbitration awards and the very limited scope of judicial review of those awards.

Memorandum of Law

The law in this area was enunciated in 1960 by the Supreme Court in the now famous, and oft-quoted Steelworkers Trilogy,[1] whose major teaching is that the proper role of this Court in enforcing or setting aside arbitration awards in labor disputes is a very limited one. The Court directed lower federal courts to give

[1] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593. These are hereafter referred to as *American Mfg.*, *Warrior & Gulf*, and *Enterprise Wheel*, respectively.

considerable, but not conclusive, deference to the decisions of arbitrators. This Court has "no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim" when faced with the question of whether a given issue is arbitrable. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568. Since the parties agreed to submit the dispute to the arbitrator, and to abide by his decision, the courts should not normally review the merits of his award; the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596.

But this is not to say that the Court is without any power of judicial review, for the Court went on to say:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of individual justice. He may look for guidance from many issues, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *Id.* at 597.

The law is easy to state, but often difficult to apply, and, as may be expected, there is no clear unanimity among the Courts of Appeal as to how much latitude will be given the arbitrator even when he appears to have exceeded his authority. There is a paucity of decided cases on this point in the Fourth Circuit Court of Appeals, but in a recently decided case, *Monongahela Power Company v. Local No. 2332 IBEW*, No. 75-1329 (slip opinion, Feb. 9, 1976), the court set aside an arbitrator's award saying:

> The powers of an arbitrator are not unlimited. He derives his authority from and is bound by the

> terms of the contract from which he draws his authority; and while "[H]e may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." His function is confined to the interpretation and application of the collective bargaining agreement under which he acts and, while he may give his own construction to ambiguous language, he is without any authority to disregard or modify plain and unambiguous provisions.

Thus, this Court does have a role to play, albeit a limited one, in the arbitration process. It is then necessary to examine each of the Company's five grounds for vacating the arbitration award in light of the applicable legal principles.

1. *Did the arbitrator ignore the clear language of the agreement?* The key language appears in Article XIV of the agreement. It provides, in essence, that the Company has the right to schedule vacation shutdowns subject only to the conditions that the time of the shutdown be "a matter for negotiations" and that the time of the shutdown or shutdowns for each year be designated prior to January 1, after having been "made a matter for negotiations." The Company claims that this language is clear and unambiguous, but that the arbitrator did not apply the language as it was written. Instead, Westinghouse claims, he read the contract to require that the shutdown, *qua* shutdown, was the subject of negotiation, relying on language in the arbitration award, where the arbitrator stated, at page 2: "Under that provision, a vacation shutdown in Christmas week 1975 had to be a 'matter for negotiations' prior to January 1, 1975." At page 4 he stated: "A vacation shutdown with the numerous questions it raises . . . is not a matter which can reasonably be explored so quickly." Again at page 6 the arbitrator refers to "the question of a vacation shutdown" being a matter for negotiations.

It is clear that the *only* matter to be negotiated was the time of the shutdown. A careful review of the transcript of the arbitration hearing, the arbitration award, and all pleadings fails to reveal that the Union ever made a counter-proposal related to the timing of the shutdown. Instead, the Union's questions and proposals went to other matters, unconnected with the question of the timing of the shutdown. Moreover, the arbitrator ruled that the Company had failed to provide sufficient time to negotiate the vacation shutdown "with the numerous questions it raises."

It is clear that the arbitrator ignored the plain and unambiguous language of the contract which limited the matter to be negotiated to the "time" of the vacation shutdown.

2. *Did the arbitrator's award go beyond the issue submitted to him?* In one sense this looks like a rehash of the previous argument, in that the issue here again is whether the arbitrator decided that the Company had failed to afford sufficient opportunity to negotiate the "numerous questions" raised by the proposed shutdown rather than whether the Company had failed to negotiate the time of the shutdown. But this is not really the same, as it is not bottomed on the same principles. The previous argument goes to the substantive question of contract interpretation while this argument goes to the procedural question of the wording of the issue as it was submitted for arbitration.

Since an arbitrator's jurisdiction and power are based on the consent of the parties, he cannot rule on any issue which is either not arbitrable under the contract or is not comprehended within the matter submitted to him. *Enterprise Wheel, supra.* Article III, § 9 of the agreement provides that: "The dispute as stated in the request for arbitration shall constitute the sole and entire subject matter to be heard by the arbitrator." The agreement further expressly provides that there shall be

no presumption of arbitrability of any issue. The Union's request for arbitration reads:

> The sole issue to be arbitrated is as follows: Did the Company violate the agreement in Article XIV, Section 1 by failing to negotiate with the Local Union the time of their announced 1975 vacation shutdown?

A careful perusal of the arbitration opinion and award shows that the arbitrator exceeded the scope of the submission. In the final paragraph on page 3, the opinion says:

> The arbitrator finds merit in the Union's position. When the parties provided that the question of a vacation shutdown was to be a "matter for negotiations" they must have contemplated a meaningful and not a pro-forma exchange. . . . Some matters might well lend themselves to being considered in only one meeting, and still have been the subject of "negotiations." A vacation shutdown, with the numerous questions it raises, however, is not a matter which can reasonably be explored so quickly.

Nowhere in his opinion does the arbitrator indicate that he recognized that only the *time* of the shutdown needed to be arbitrated.

The terms of the submission indeed were clear, plain, exact and unambiguous. Article III, §9 C.4 of the collective bargaining agreement limits the arbitrator's authority to the dispute as stated in the request for arbitration. The arbitrator clearly exceeded the scope of the submission.

3. *Was the arbitrator's finding of fact contrary to the evidence?* The arbitrator found that 37 days was too short a period to allow for negotiations and this Court will not disturb his findings of fact.

4. *Did the award constitute punitive damages? If so, was it improper?* The remedy prescribed by the arbitrator was:

> (a) For those employees who had already taken their full 1975 vacation — another 3 days of vacation pay during the vacation shutdown.
>
> (b) For those employees who had saved 3 days of vacation for Christmas week — an additional 3 days of paid vacation in 1976.

Thus, each member of IBEW was to receive an additional three days of vacation pay either in 1975 or in 1976. While the arbitrator carefully labeled this as a "non-punitive" remedy, the label fails to identify the product. Every employee received his full vacation in 1975, so there was no loss for which the employees or the Union could be compensated.

It is settled arbitration law that an award of punitive damages will not be granted by arbitrators except in the rare circumstances where an employer has willfully or wantonly violated the contract, or where the agreement specifically provides for such a remedy. *See,* Fairweather, *Practice and Procedure in Labor Arbitration,* 303-309 (BNA, 1973); Elkouri and Elkouri, *How Arbitration Works,* 356 (3d Ed. 1973).

Several cases have considered the issue of arbitration in vacation pay cases. *See, e.g., International Paper Co., Container Div.,* 76-1 ARB 5444 (1976); *Phillip Carey Mfg. Co.,* 37 LA 134 (1961); *Alan Wood Steel Co.,* 33 LA 772 (1960). In each of these cases the arbitrators refused to award damages because no monetary losses were shown, and they were without authority to grant punitive damages. This existing custom and practice among labor arbitrators might be said to be part of the "industrial common law" referred to in *Steelworkers v. Warrior & Gulf, supra,* 363 U.S. at 580. As such, it became part of the collective bargaining agreement between Westinghouse and IBEW, and was part of the law to be followed and applied by the arbitrator.

The arbitrator did not find that any of the employees was injured, but chose to levy a fine for violation of the

contract rather than to assess damages to compensate the injured parties.

Thus the award of damages was improper because it bears no relationship to any demonstrable loss and there was no showing or finding of malice, illwill or wanton violation of the agreement. The "non-punitive" label has no basis in fact.

5. *Did the award of three additional days of paid vacation improperly modify the terms of the agreement?* In light of the preceding discussion, it is not necessary to consider this issue.

For the foregoing reasons it is this day of , 197 by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of the plaintiff for summary judgment be, and the same is, hereby granted; and

2. That the motion of the defendant for summary judgment be, and the same is, hereby denied.

.....
United States District Judge.

JUDGMENT

In accordance with the Memorandum and Order dated and filed in the above entitled case, it is

ORDERED and ADJUDGED: That the motion of plaintiff for summary judgment is granted and that judgment is entered in favor of plaintiff against defendant,

United States Court of Appeals
For The Fourth Circuit

No. 76-2268

Westinghouse Electric Corporation,
Aerospace Division,
Appellee,

v.

International Brotherhood of Electrical Workers
AFL-CIO & CLC, Local Union No. 1805,
Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

BUTZNER, Circuit Judge:

The International Brotherhood of Electrical Workers (I.B.E.W.) appeals an order of the district court vacating an arbitrator's award against Westinghouse Electric Corporation. We affirm because the arbitrator's allowance of damages was improper.

The collective bargaining agreement permits Westinghouse to shut down for vacations, leaving the time of the shutdown to negotiations. The company is required to designate this time before January 1 of the year in which the shutdown is to occur.[1]

[1] Article XIV, section 1 of the agreement provides in part:

> The Company will schedule vacation shutdowns for vacation purposes, and the time of year of the vacation shutdowns will be a matter for negotiations. The vacations will run concurrently with the vacation shutdown periods. . . .
>
> The Company shall be required to designate the time of the vacation shutdown or shutdowns before January 1 of the vacation year after such time has been made a matter for negotiations as above provided.

On November 25, 1974, Westinghouse formally notified the union that it was planning a vacation shutdown for Christmas week of 1975. This decision was based on sound business reasons, and at no time has the union questioned the company's motives for choosing that week.[2] After a slight delay attributable to the fault of neither party, a negotiating session was held on December 16, 1974. At that time, the union representative raised several questions which had been discussed at an earlier union meeting. Since the representative had to report to the full membership for a vote, he asked that a final decision be delayed until after the next union meeting, scheduled for January. However, because the collective bargaining agreement required that the shutdown be designated before January 1, and because other unions at the plant had already agreed to the Christmas week shutdown, Westinghouse advised the I.B.E.W. on December 20, 1974, that the vacation shutdown would take place during Christmas week, 1975.

Dissatisfied with the company's unilateral action, the union filed a grievance, and when the dispute remained unsettled, requested that it be submitted to arbitration. After a hearing, the arbitrator found that the company had violated the collective bargaining agreement by failing to provide sufficient time for negotiations in advance of the January 1 deadline, and he awarded each employee three additional paid vacation days.

Westinghouse then filed this action to set aside the arbitrator's award. On cross-motions for summary judgment, the district court granted the company's request. It found that the arbitrator ignored the language of the bargaining agreement by viewing the shutdown itself, instead of just the time of the

[2] The company proposed to schedule the vacation shutdown during Christmas week because the natural gas supply would be curtailed in winter; in the past, many employees had taken Christmas week off even when a shutdown was not scheduled; and the employees would use only three of their vacation days since the week already had two holidays.

shutdown, as a matter for negotiation. It also found that the arbitrator exceeded the scope of the issues submitted to him for arbitration. Nevertheless, the court accepted his finding that the 37 days between the date of the company's notice and the January 1 deadline was too short a period to allow for negotiations. Finally, the court concluded that since the union had failed to prove any monetary loss, the award of damages was impermissibly punitive.

We find no error in the district court's acceptance of the arbitrator's finding that the company allowed insufficient time for negotiations. Notwithstanding this violation, we agree with the district court that the arbitrator's award of damages cannot be sustained.

In International Paper Co., Container Div., 76-1 ARB ¶8214 (1976), the arbitrator found that the company had violated a collective bargaining agreement by scheduling a vacation shutdown. Nonetheless, with respect to the appropriate remedy for the violation, he stated:

> The Union has asked that the remedy for the breach be an award of additional vacation time with pay. I see no justification for such a remedy. Though the vacation shutdown interfered with certain valuable employee rights, no employee lost any vacation time because of the shutdown. Such an award would be punitive in nature, and there is nothing in the record to justify a punitive sanction. The Company acted in good faith, with advance notice and made a sincere effort to reach an understanding of its rights under the Agreement. . . . I can find no basis for calculating any monetary damages in this case or for devising an effective affirmative remedy.

Similiarly, in another vacation shutdown case, Philip Carey Mfg. Co. 37 LA 134, 136 (1961), the arbitrator said:

> [T]here is no established concept of which I am aware to the effect that contract violations involv-

> ing no monetary loss to employees are to be remedied by payments based on inconvenience or designed as punitive damages. On the contrary, there are innumerable cases in which arbitrators have found violations of contract provisions without awarding any monetary compensation, when no monetary losses are shown.

As the district judge noted, these arbitration decisions embody principles that may be viewed as a part of the "industrial common law" which is incorporated into the collective bargaining agreement. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). With respect to vacation shutdowns, compensatory damages may be awarded only when a breach of the bargaining agreement causes a monetary loss. In the absence of willful or wanton conduct, punitive damages should not be awarded. *See also* F. Elkouri and E. Elkouri, How Arbitration Works 356-57 (3d ed. 1973); O. Fairweather, Practice and Procedure in Labor Arbitration 303-09 (1973). In this case, the union makes no claim that the company's conduct was willful or wanton, and the arbitrator characterized his award as "non-punitive." With respect to the employees who took their vacation during the shutdown, the arbitrator ruled:

> Employees who have reserved three days of vacation for this particular period should be granted three additional days of paid vacation in 1976.

It is clear, however, that none of these employees suffered any monetary loss. Each received the exact number of paid vacation days to which he was entitled without losing any days of work.

The entitlement to damages of the workers who chose to take their vacations before Christmas week presents a closer issue. As to them, the arbitrator ruled:

> Employees who have not been deprived of vacation time because they have already taken their full vacations should not be compelled to take a three-day layoff without pay. They should therefore be paid for the three days.

At first blush this award seems plausible. However, examination of the arbitration record discloses that there is no evidence to support a finding of any compensable damage to these employees. The arbitrator ruled that the only breach of the agreement was the company's failure to afford sufficient time for negotiations. The union did not introduce proof that this violation influenced any employee's scheduling of his vacation. Thus, no causal relationship between the company's violation of the agreement and the loss claimed by these employees has been shown.

The employees had about 12 months notice that the vacation shutdown was scheduled for Christmas week, 1975. Instead of insisting that all vacations coincide with the shutdown, the company accommodated its employees who desired to schedule their vacations at other times. No employee testified that he suffered any monetary loss, inconvenience or hardship. Moreover, the evidence fails to show, and it is unreasonable to assume, that even if the company had allowed sufficient time for negotiations, a shutdown could have been scheduled that would have suited the convenience of every employee.

Though nominally compensatory, the award was actually punitive. Because no provision of the contract warranted this punishment, the arbitrator exceeded his jurisdiction. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). We therefore affirm the judgment of the district court.

JUDGMENT

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
Clerk.

BEFORE
SEYMOUR STRONGIN
ARBITRATOR

In the Matter of the Arbitration
Between
Westinghouse Electric Corporation
and
International Brotherhood of Electrical Workers,
AFL-CIO Local Union No. 1805

AAA Case No. 14 30 0638 75M/H

Grievance No. 4049

The issue in this case is whether the Company met the "negotiations" requirement of Article XIV, Section 1, of the Agreement when it scheduled a vacation shutdown for Christmas week, 1975. This Section provides in part:

> The vacation year will be a calendar year, and during the first quarter of the year, departmental

> heads shall consult with all employees entitled to vacations and establish the schedule for vacations . . .
>
> The Company will schedule vacation shutdowns for vacation purposes, and the time of year of the vacation shutdowns will be a matter for negotiations. The vacations will run concurrently with the vacation shutdown periods. It is recognized that some employees will be requested to work during the vacation shutdown periods . . .
>
> The Company shall be required to designate the time of the vacation shutdown or shutdowns before January 1 of the vacation year after such time has been made a matter for negotiations as above provided . . .

Under that provision, a vacation shutdown in Christmas week 1975 had to be a "matter for negotiations" prior to January 1, 1975.

On November 25, 1974, the Company notified the Union that the Company was considering a "Christmas week closedown" in 1975, pointing out that two contract holidays (Wednesday, December 24, and Thursday, December 25) fell in that week. The Union attempted to arrange a negotiating committee meeting between the parties to discuss the proposed shutdown, but, in part because of the death of a former industrial relations member of the Company, the meeting did not take place until December 16, only two weeks before the contractual deadline. The Union had, however, discussed the matter at its monthly membership meeting on December 8, at which time the members raised many questions with respect to the Company's proposal.

The meeting of December 16 proved to be the only negotiating meeting between the parties on the question of the shutdown. Although the testimony with respect to this meeting is somewhat disputed, it seems reasonably clear that the Union indicated to management that there was some divergence of view within the Union about the matter, and that the Union expressed a desire

to extend the January 1 deadline so that the matter could be discussed and voted on at the Union's next monthly membership meeting. Management apparently understood the main thrust of the Union's position to be in opposition to any shutdown. A few days after the December 16 meeting, the Company formally announced its intention to implement the proposed vacation shutdown. There were no further negotiations about the matter.

In deciding to shut down for Christmas week, 1975, the Company was motivated by numerous considerations, including such factors as the fuel shortage, the existence of two holidays in that week, the tendency of some employees to take vacations in that week, and the tendency of other employees to be absent at that time. With respect to the Union's suggestion that by mutual agreement the decision could be postponed beyond the contractual deadline of January 1, the Company pointed out that it had similar provisions in its agreements with two other unions at this Plant, and it was therefore unable to accede to the postponement requested by this Union. The Union responds that it is not challenging the Company's motives, and it is up to the Company as to how it handles its relations with other unions, but so far as this Union and this Agreement are concerned, there were no "negotiations", as required by Article XIV.

The Arbitrator finds merit in the Union's position. When the parties provided that the question of a vacation shutdown was to be a "matter for negotiations" they must have contemplated a meaningful and not a "pro-forma" exchange. To be sure, the Company is not bound to negotiate either to formal impasse or to agreement, but it is bound to engage in "negotiations", a term which necessarily varies in content depending on the subject matter. Some matters might well lend themselves to being considered in only one meeting and still have been the subject of "negotiations". A vacation shutdown, with the numerous questions it raises,

however, is not a matter which can reasonably be explored so quickly. The Company was well aware of its obligations under the Agreement, and it also should have been aware, long before November 25, of the reasons which led it to propose a Christmas week shutdown for 1975. It simply did not afford sufficient opportunity for the proposal to be a "matter for negotiations" as required by the Agreement.

The appropriate remedy for this violation of the Agreement is likewise a matter of dispute between the parties. The Union urges that the Arbitrator order the shutdown cancelled, and suggests that upon the issuance of such an order, the parties could negotiate an "independent compromise". The Company insists that such a remedy would be in excess of the Arbitrator's authority. Under all the circumstances and considering the fact that the Company has apparently reached agreement on the proposed shutdown with the bargaining representatives of other employees at this Plant, and that varying arrangements have been made with employees represented by this Union on the assumption that the shutdown would take place, the Arbitrator is of the view that to order cancellation of the shutdown, even assuming such a remedy lies within his authority, would not be appropriate.

The Union represents that some employees have already taken their regular 1975 vacations and will suffer a loss of three days' pay in the forthcoming Christmas week shutdown, whereas other employees disrupted their normal vacations to preserve three days for this period. The Union therefore seeks a remedy which will make both groups whole.

In the Arbitrator's view, the imposition of the shutdown on these employees without the negotiations required by the Agreement was a significant invasion of their rights under the Agreement, which must be remedied in a non-punitive fashion. Employees who have not been deprived of vacation time because they have already taken their full vacations should not be

compelled to take a three day layoff without pay. They should therefore be paid for the three days. Employees who have reserved three days of vacation for this particular period should be granted three additional days of paid vacation in 1976. This will give each employee three additional days of paid vacation, either in 1975 or 1976, and represents, in the Arbitrator's judgment, a reasonable and nonpunitive remedy for the violation found above.

DECISION

The grievance is sustained with compensation for the shutdown period or additional vacation allowance as provided above.

SEYMOUR STRONGIN,
Arbitrator.

Washington, D.C.
December 3, 1975